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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974.

No. 74-1366

ROBERT AND SANDRA SCHAEFER, ET AL.,
Petitioners,

vs.

FIRST NATIONAL BANK OF LINCOLNWOOD, ET AL.,
Respondents.

RESPONSIVE BRIEF OF RESPONDENTS THE AMERICAN STOCK EXCHANGE, INC., JOHN RISSETTO, AL VERNIERI, EDWARD CROOKS AND FRANK ALTER TO PETITION FOR A WRIT OF CERTIORARI.

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ARGUMENT.

I.

NO SPECIAL OR IMPORTANT REASONS FOR GRANTING THE WRIT ARE SET FORTH IN THE PETITION.

The Petition is plainly insubstantial. It fails to demonstrate that there are any "special or important" reasons for granting the Writ, within the meaning of Rule 19. Indeed, after carefully reading the Petition, respondents are not sure what it is about this case that petitioners consider important enough to justify seeking a Writ of Certiorari. Certainly, repeated state-

ments that antitrust enforcement is important given the "economic climate of our times" do not satisfy the requirements of Rule 19 (See Petition, pp. 4, 9).

The Petition makes vague allegations that the Seventh Circuit's decision is inconsistent with this Court's decision in *U. S.* v. *Patten*, 226 U. S 525 (1912), and "other circuit court decisions in the same general area of resolving limited jurisdiction of antitrust laws in certain areas that narrowly overlap with securities laws." (Petition, p. 12). These hints that the dismissal of the antitrust count was inconsistent with other decisions are neither true nor precise.

The Court of Appeals Opinion did not even mention the *Patten* case, though the Petition states that the Seventh Circuit "misinterpreted, misconstrued and misapplied" that decision (Petition, p. 10). Furthermore, *Patten* did not involve the manipulation of the price of stock. Rather, it involved the running of a corner on the price of cotton, a *commodity*, by competitors on the New York Cotton Exchange. The effect was to artificially raise the price of cotton, enable the conspirators to obtain control of available supply and "hamper users and consumers in satisfying their needs" 226 U. S. at 542. No such considerations are present here.

The Court of Appeals correctly held that the antitrust laws have been held applicable to other regulated industries only in situations where there was no alternative relief available to the aggrieved party (Petition, p. 27a). E.g. *Silver* v. *New York Stock Exchange*, 373 U. S. 341 (1963): cf. *Ricci* v. *Chicago Mercantile Exchange* 409 U. S. 289 (1973). In such situations, implied repeal of the antitrust laws is severely proscribed, unless it is found that the challenged practice is necessary to the functioning of the regulatory statute which is asserted to pre-empt the antitrust laws.

Here, in contrast to such situations, a complete statutory scheme of relief under the Securities Act of 1933 and the

Securities Exchange Act of 1934, is specifically directed to the manipulation of stock prices, and was availed of by petitioners in Count I of their Complaint. Indeed, as to respondents Rodman and Renshaw, Myers, Gorman and Fogelson, the Court of Appeals reversed their dismissal under Count I, and remanded this case for trial as to those respondents on the alleged securities law violations (Petition, p. 24a).

In addition to the reasons stated in its Opinion, the Court of Appeals also adopted all of the reasons set forth in the District Court opinion for dismissing the antitrust count (Appendix, p. 28a; 326 F. Supp. 1186, 1190-92). The District Court Opinion reviewed the legislative history of the securities laws and concluded that they provided a complete remedy for manipulation of stock prices. Petitioners have not attempted to argue with the reasoning expressed therein.

II.

EVEN IF A REMEDY EXISTED UNDER THE ANTITRUST LAWS, OTHER GROUNDS ASSERTED TO THE COURT OF APPEALS BUT NOT RULED UPON BY IT, WOULD BAR AN ANTITRUST COMPLAINT AGAINST THE EXCHANGE AND SPECIALIST RESPONDENTS.

In addition, no purpose would be served by granting the Writ since two other independent grounds for barring an action against the Exchange and specialist respondents exist. These grounds were asserted in the Court of Appeals by the Exchange and the specialists in support of dismissing the antitrust count against them. The Court of Appeals did not find it necessary to reach either point in light of its holding that no remedy existed under the Sherman Act.

First, the antitrust count is barred as to the Exchange and the specialists by the four year statute of limitations contained in Section 4B of the Clayton Act. 15 U. S. C. § 15b. At the latest, the alleged conspiracy ended August 23, 1967 (Peti-

tion, p. 8a). The Amended Complaint naming the Exchange and specialists as additional defendants, was filed on October 18, 1972, over five years later (Petition, p. 9a). In light of the Court of Appeals holding that the statute of limitations was not tolled as to the Exchange and specialists (Petition, pp. 24a-26a), a finding not challenged by this Petition, the statute of limitations would bar the antitrust claims against the Exchange and specialists.

Second, even if a remedy existed under the antitrust laws, the allegations against the Exchange and specialists do not charge that they were part of the manipulation conspiracy, but only that they failed to prevent it. In essence, they are charged with violating the law by neglecting a duty to discover the conspiracy. Section 1 of the Sherman Act is not violated by inaction. A conspirator must actually have knowledge of the common plan, and commit some act in furtherance of it. As stated by the Seventh Circuit in *United States* v. *Standard Oil Company*, 316 F. 2d 884, 890 (7th Cir. 1963):

> "The substantive law of trade conspiracies requires some consciousness of commitment to a common scheme. Theatre Enterprises, Inc. v. Paramount Film Distributing Corp., et al., 346 U.S. 537, 540-541 74 S. Ct. 257, 98 L. Ed. 273. It has been stated there is no such thing as an 'unwitting conspirator.' United States v. National Malleable & Steel Castings Co., N. D. Ohio, 1957 C C H Trade Cases Par. 68890, at page 73601. Unless the individuals involved understood from something that was said or done that they were, in fact, committed to raise prices, there was no violation of the Sherman Act."

The mere allegation that the Exchange and specialists failed to properly supervise trading in Hercules-Galion stock does not meet the standards of knowledge and action required to state a cause of action for price fixing.

CONCLUSION.

For all of the foregoing reasons, respondents respectfully pray that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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